

AUG - 4 1993

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

CLARK-BADER, INC. d/b/a
TMC LONG DISTANCE,
Complainant,

v.

PACIFIC BELL TELEPHONE COMPANY,
Defendant

CC Docket No. 93-161

REQUEST FOR PERMISSION TO FILE APPEAL
FROM ORDER OF THE PRESIDING JUDGE

Charles H. Helein
Julia A. Waysdorf
Donald H. Manley
Michael R. Carithers
GALLAND, KHARASCH, MORSE
& GARFINKLE, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
Telephone: (202) 342-5200
Facsimile: (202) 342-5219

Attorneys for
CLARK-BADER, INC. d/b/a
TMC LONG DISTANCE

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SUMMARY

The Presiding Judge's Pre-Hearing Order granted TMC Long Distance's ("TMC") pending request to take depositions of five

through its extensive cooperative efforts at scheduling these uncontested depositions. Although the final agreement with PacBell as to specific dates and times that its employees would be produced and show up lagged slightly beyond July 26, such depositions were certainly "initiated" on time, and TMC properly relied on this reasonable interpretation of "initiated" in cooperatively arranging with PacBell as to the scheduling of them.

The Presiding Judge's ruling arbitrarily upsets the negotiated

benefit of the parties, the Presiding Judge, and the record. The loss of TMC's opportunity for these already-ordered depositions is particularly prejudicial to TMC, and the ruling will likely tend, at the least, to prolong and complicate the hearing. However, it is more likely that the loss of these depositions will so hamper TMC's ability to complete its direct case that if the requested appeal were deferred and raised as an exception, a remand and rehearing would most certainly be required. For these reasons, the Presiding Judge should allow TMC to file an appeal of the ruling eliminating the depositions previously ordered to be conducted. Upon grant of this request, TMC will promptly file such appeal pursuant to the provisions of Section 1.301(c) of the Commission's Rules.

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To: The Honorable Walter J. Miller
Administrative Law Judge

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conduct of further discovery by the parties, and granted all pending predesignation motions for extraordinary discovery.

3. Included among the predesignation discovery motions that were granted was Complainant's Motion for Leave to Take Additional Depositions, which was filed by TMC with the Common Carrier Bureau on January 29, 1993. That Motion requested permission to take additional depositions of five named individuals and demonstrated in detail that the need for those additional depositions had been revealed during predesignation depositions.

4. Pursuant to the Presiding Judge's grant in the PHO of TMC's request to conduct these depositions, TMC contacted Defendant's counsel immediately after release of the PHO to arrange for the scheduling of these additional five depositions. In an effort to embark upon the post-designation phase of this proceeding in a cooperative spirit, and also in the interest of working out discovery issues without unnecessarily involving the Presiding Judge on non-contentious matters, TMC and PacBell began an extensive series of discussions concerning the taking of these depositions, as well as concerning additional discovery that PacBell indicated it desired. Through this cooperative dialogue, the parties were able to agree upon the scheduling of depositions for three of the individuals named in TMC's Motion (Mr. Wheatley, Mr. Bandler, and Mr. Lockton). Both parties compromised on issues concerning the timing and location of these depositions, and TMC, on August 2, 1993, filed with the Commission, the Presiding Judge, and PacBell, Notices of Deposition announcing specific times and locations of the agreed-upon depositions. Pursuant to the

agreement of the parties, depositions have been scheduled to be conducted in California during the week of August 16, 1993, well prior to the September 17 deadline for the completion of discovery.^{2/}

5. The Presiding Judge has now dismissed TMC's Notices of Deposition, and has ruled that despite the agreement of the parties, the depositions may not be conducted as scheduled by the parties. The basis of this ruling is that the Notices were not filed with the Presiding Judge on July 26, 1993; paragraph 10 of

10. The Court has also ruled that the parties must file a joint motion for further discovery.

1.311 through 1.340, and completed on or before September 17, 1993."

6. TMC respectfully requests leave of the Presiding Judge to file an appeal with the Review Board on the issue of whether these depositions should be allowed to be conducted as had already been agreed to by the parties. As detailed below, TMC requests permission to demonstrate to the Review Board that in acting before July 26 to arrange the scheduling of the depositions, TMC and PacBell acted in compliance with a reasonable interpretation of paragraph 10 of the PHO and in full conformance with the Commission's rules. The depositions were intended by the parties to be conducted without any unnecessary direct involvement by the Presiding Judge, and thus there was no need to file any formal pleading to "initiate" such discovery. Indeed, if anything, the discovery in the form of these depositions was initiated months ago, with the filing and grant of TMC's request to conduct them.

7. Moreover, TMC also will demonstrate that permitting it to conduct the depositions as agreed will not cause any prejudice to PacBell, and neither will it place a burden on the FCC's administrative processes or lead to delays in the resolution of this proceeding. At the least, it appears likely that allowing the discovery as previously contemplated would expedite the conduct of the hearing itself by allowing the parties to narrow and refine the issues in dispute and to focus the evidence more precisely. However, denying TMC the right to take these depositions will seriously hamper its ability to effectively prepare its direct

case, will negatively impact public interest concerns that the Commission previously has raised in the context of post-designation hearing discovery in common carrier complaint proceedings, and will require the subpoena of additional witnesses to appear at the hearing to be held in November. Indeed, because the denial of this critical discovery so egregiously inhibits TMC's ability to prepare its direct case, further hearings would be required if an appeal is now deferred and this ruling is later successfully appealed on exceptions to the initial decision. Moreover, because the ruling is based on an unreasonably limited interpretation of the language of the PHO that is not supported by the Commission's Rules, a novel question of policy is presented. TMC, therefore, respectfully submits that the issues raised in the Presiding Judge's ruling are the proper subject for an appeal to the Review Board under standards set forth in Section 1.301(b) of the Commission's rules concerning the appeal of interlocutory rulings.

II. TMC's Depositions Will be Conducted and Completed Within the Time Frame Mandated in the PHO

7. In pursuing the scheduling of further depositions with PacBell, TMC was aware of the language in the PHO requiring that discovery be initiated by July 26 and completed by September 17, 1993. However, TMC reasonably interpreted that language to mean that with respect to these already-ordered depositions, TMC was required to initiate making arrangements with PacBell concerning discovery by the July 26th date, and that any depositions (or other forms of discovery) that were conducted had to be concluded by September 17, 1993. Accordingly, TMC's counsel had numerous

discussions with counsel for PacBell, commencing weeks prior to the July 26th date, and arranged for depositions to be conducted and completed during the week of August 16th, well within the time frame specified in the PHO. Therefore, TMC's view was that it was correctly proceeding within the parameters as established in the PHO. Moreover, because the Notices of Deposition for Messrs. Wheatley, Lockton, and Bandler (all PacBell employees) were filed pursuant to a voluntary agreement between the parties, TMC reasonably assumed that the Presiding Judge would not have to decide any issues relating to the holding of the depositions, and thus there was no need for the Presiding Judge to rule on anything prior to the deposition.^{3/}

8. TMC respectfully submits that its interpretation of the PHO is reasonable and in accordance with the Commission's rules. TMC recognizes that the Presiding Judge in an adjudicatory hearing

noticed on August 2, 1993, is well within the proper exercise of that discretion, as well as in conformance with the FCC's Rules.

It is also respectfully submitted that under these circumstances

11. It has previously been recognized in the context of a hearing on a common carrier complaint that the discretion of the presiding judge over discovery is not as absolute as in the mass media comparative hearing area. There are overreaching public interest concerns that must be protected in the common carrier arena that are not as directly implicated in streamlined comparative hearings. In Bunker-Ramo Corp. v. Western Union Telegraph Company, 32 FCC 2d 860, 26 RR 2d 164 (Rev. Bd. 1972), the Review Board remanded a complaint proceeding to the Presiding Judge to be heard de novo, because of what were held to be abuses by the Presiding Judge in conducting discovery. The Review Board stated that the Commission's discovery rules must be administered by the Presiding Judge in a manner that will "facilitate preparation, eliminate surprise and promote fairness," particularly in a situation where one of two adversarial parties possesses information essential to the proof of its adversary's case. Id. at 865 citing Rules of Practice and Procedure to Provide for Discovery

of the Judge's denial of the discovery motion, the Review Board

14. The decision in the Bunker-Ramo case further underscored the public interest standard that must be satisfied in rulings involving discovery in common carrier complaint proceedings. As stated by the Review Board:

The significance of the instant complaint, which alleges discrimination by a common carrier in favor of its wholly-owned competitive subsidiary, involves grave public interest questions which extend far beyond the private rights of Bunker-Ramo and Western Union.... Moreover, it is quite apparent that Western Union is the only source of much of the evidence which is essential to a complete record in this

in the post-Divestiture world of interexchange telecommunications, but also to the remedial purposes of the Modified Final Judgment explicitly mandating such access as a means to rectify the anti-competitive environment created by Defendant's past participation in the monopoly provision of interexchange services, the issues raised transcend the purely private interests of the litigants, as they did in Bunker-Ramo.

16. These critical public policy concerns should not be subordinated to concerns over a procedural misunderstanding that has harmed no one. These recognized public interests also make it even more important that an appeal to the Review Board at this time of the interlocutory order denying discovery is appropriate under Section 1.301(b) of the Commission's Rules.

IV. No Procedural Prejudice Will be Caused to any Party by the Taking of the Depositions as Noticed, But Considerable Prejudice Will be Caused to TMC If the Depositions are Not Permitted

17. It is clear that a reversal of the interlocutory order and allowance of the requested depositions will not result in any delay to the conduct of this proceeding. Because the depositions as already scheduled will be completed well before the September 17, 1993 deadline established in the PHO, there will be no impact on the procedural schedule established in the PHO and, therefore, no burden on the hearing process. Further, because PacBell had previously agreed to the scheduling of the depositions for which Notices were filed by TMC, clearly no prejudice will be caused to PacBell if the depositions are permitted to be conducted as scheduled. In contrast, however, if the depositions are not

conducted, TMC will be seriously prejudiced in its ability to adequately prepare its case.

18. As the Presiding Judge is aware, TMC has alleged, among other things, that Pacific Bell failed to provide TMC with equal access and that such failure caused irreparable harm to TMC. As set forth in TMC's predesignation Motion, and reiterated briefly below, the depositions in issue are essential to determining Pacific Bell's actions or inactions regarding the equal access issues, as follows:

Mr. Cox

At the time period in issue in this complaint, Mr. Cox was Executive Vice President of the PacBell Marketing department that modified, on an informal basis, PacBell's 1985 Routing Policy for the San Diego LATA. The original written policy was designed on an engineering basis to rely on direct trunking from end offices, the changed policy was as initiated by Mr. Cox' department, was to home on the access tandem, the 90T.

The Deposition of Mr. Cox is being sought to explore his purpose in changing the routing policy in 1985. TMC contends, based on previous documents obtained in discovery, that the change was based on PacBell's own internal plans to expand its operations after divestiture. Specifically, Pacific Bell needed the access tandem and a change in the 1985 Routing Policy (1) because all direct trunking routing homed on AT&T's 4ESS switches and Pacific Bell had no control over these switches and hence no opportunity to implement or plan for its own expansion of services in the LATA; (2) Pacific Bell could not retain, as opposed to defaulting to AT&T, the operator services business in the LATA, if it did not use the access tandem because AT&T had all operator services located in its 4ESS switches; and (3) Pacific Bell could not control and manage its own intraLATA traffic without the access tandem because once again it would be routed under the 1985 Routing Policy to the 4ESS' switches of AT&T.

TMC has just learned through receipt on August 2, 1993 of a memorandum from PacBell, that the informal change to the 1985 Routing Policy was formalized on or about April 30, 1987. As that memorandum (a copy of which is attached hereto as Exhibit A) indicates, Mr. Cox was directly involved in this change, as were Mr. Bandler and others. As the changes in the routing policies and Pacific Bell's true motivations therefore are key elements

supporting Complainant's contentions that Pacific Bell violated its equal access obligations the deposition of Mr. Cox is important to an explanation of that policy.

19. For these same reasons, the depositions of Mr. Bandler and Mr. Lockton are also essential to Complainant's case. Each of these individuals were at a similar management rank as Mr. Cox at the time the 1985 Routing Policy was changed, and therefore need to be examined about their participation in and knowledge thereof, as follows:

(1) Mr. Bandler, whose title was/is Vice-President, Engineering and Planning, is expected to testify concerning the technology and products chosen by Pacific Bell's Network Engineering and Planning Division to implement Pacific Bell's 1985 routing policy for interexchange carrier equal access. Moreover, as already discussed, Mr. Bandler, like Mr. Cox was also involved

experienced by TMC. While other Pacific Bell employees have been

to effect discovery on the issues on damages. However, since the Presiding Judge's ruling contemplates that no depositions or other kinds of further discovery are to be allowed because neither party filed the discovery request by July 26, 1993; presumably no discovery will be allowed to take place on the issue of damages prior to hearing. This lack of discovery will likely seriously impair and complicate the conduct of the hearing for both adversary parties, as well as the Bureau, on the damages issues. Information on damages that ordinarily would have been discoverable (as with all other information that would have been discovered at the canceled depositions) will now have to be discovered and worked through in full in the hearing itself. The results will likely be a more drawn-out and less refined hearing and a record that includes matters that could have been obviated through reasonable discovery.

23. Most importantly, however, it is clear that the inevitable lengthening of the hearing as a result of the loss of discovery will not fully make up for that loss of discovery, and that rejection of an interlocutory appeal requested here will result in a remand and full rehearing if a post-hearing appeal is successful on this issue. As noted above, the denial of these necessary depositions prevents TMC from preparing basic portions of its proof of its direct case. If TMC is forced to await the passing of the Initial Decision before appealing this decision and that exception is then granted on appeal, a remand and further

hearing would be necessary to rectify the Judge's decisions.^{4/} Both the Commission's and the parties' resources would be far less likely to be wasted if an appeal were allowed at this time. The necessity of remand and rehearing if an interlocutory appeal is not allowed is a critical factor militating toward a grant of the appeal request.^{5/}

V. Conclusion

24. For the reasons stated above, TMC respectfully requests that the Presiding Judge permit an appeal to be filed to the Review Board on the interlocutory ruling issued orally on August 2, 1993 dismissing Notices of Depositions that were filed by TMC on that


^{4/}Such a further hearing was ordered by the Review Board in the Bunker-Ramo case, supra.

^{5/} TMC is concerned that, based on certain remarks made by the Presiding Judge, the Judge's oral interlocutory ruling may have reflected an incorrect impression concerning TMC's conduct and submissions to the Common Carrier Bureau in the predesignation phase of this proceeding. For example, after reviewing the Judge's oral ruling, TMC also received a copy of "Comments" that were filed with the Bureau on August 2, 1993 concerning a pending Petition for Clarification. In those Comments, the Bureau, on page 2 and note 3, apparently is accusing TMC of attempting to "undermine the integrity of the Commission's processes." Significantly, the Bureau's comments are based exclusively on unsupported and as yet untried and unproven allegations that have been raised by PacBell concerning information contained in documents previously filed by TMC. TMC, therefore feels compelled to point out that any claims raised by PacBell concerning the "knowing" submission by TMC of

same date. If an appeal is allowed to the Review Board, TMC will demonstrate to the Board that a reversal of the ruling is required in accordance with the points addressed above.

Respectfully submitted,

CLARK-BADER, INC. d/b/a TMC LONG DISTANCE

By: 
Charles H. Helein
Julia A. Waysdorf
Donald H. Manley
Michael R. Carithers

Its Attorneys

Galland, Kharash, Morse & Garfinkle, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007
Telephone: (202) 342-5200
Facsimile: (202) 342-5219

ATTACHMENT A

Aug. 2 1993
Nancy C. Woolf
Attorney

Legal Department
140 New Montgomery Street
San Francisco, California 94105
(415) 542 7657

PACIFIC * BELL
A Pacific Telec. Company

August 2, 1993

Charles H. Helein, Esq.
Galland, Kharasch, Morse & Garfinkle, P.C.
Canal Square
1054 Thirty-First Street, N.W.
Washington, D.C. 20007-4492

Dear Mr. Helein:

A document has just been forwarded to me which may relate to this litigation. As you know, TMC has questioned witnesses (and intends to question more) about the 1985 Routing Policy. Enclosed with this letter is a 1987 IEC Routing Policy. As you can see from the document, this policy supersedes the 1985 policy. No witness referred to this policy in the depositions, nor has TMC requested any subsequent policy statements. However, I felt that TMC would consider this policy relevant to its case, especially in light of upcoming depositions and since TMC's complaint is limited to damages occurring from March 1987 through the end of 1988.

Again, this policy has just come into my possession on Friday.

IEC ROUTING POLICY

**PAGE 1
18-0500-001**

TRUNK ROUTING POLICY: Carrier Issues Forum Stewardship

San Ramon, April 30, 1987

Messrs. Bandler, Cox and Kaplan

Attached is a new Trunk Routing Policy for Feature Groups B, C and D which is intended to supersede the existing policy dated September 23, 1985. This letter recommends assigning stewardship for this and all future revisions of the Policy to the Carrier Issues Forum.

While the Carrier Issues Forum primarily addresses issues affecting carriers, the inter-discipline makeup of the team allows a broad perspective for issues that go beyond the Carrier marketplace, such as trunk routing. Optimal routing of traffic is often a combination of factors, including cost, volumes, customer needs and engineering judgement. Recognizing the variables that can exist, the Forum undertook to develop a policy that describes how we do business rather than specific rules and requirements for routing FG-B, D and D traffic. The policy encourages dialog and provides the latitude necessary to nurture an environment of mutual trust between Carriers and Pacific Bell.

The proposed policy was reviewed with the largest Carriers and comments were solicited. Responses from the Carriers were positive and minor changes they suggested have been incorporated.

With your approval, as indicated by your signature below, the Carrier Issues Forum will assume stewardship for the Trunk Routing Policy. The policy will be communicated within Pacific Bell and with the Carriers.

**Signed,
Ross Ireland
Chair, Carrier Issues Forum**

**C. L. Cox
EVP-Marketing**

**M. A. Kaplan
EVP-Operations**

**M. L. Bandler
VP-Network Engineering and Planning**